BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL DEVELOPMENT PERMIT ISSUED BY MASON COUNTY TO THE HAMA HAMA COMPANY	
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY and SLADE GORTON, ATTORNEY GENERAL, Appellants, v. MASON COUNTY and THE HAMA HAMA COMPANY, Respondents.	SHB No. 115 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PER W. A. GISSBERG:

This matter, a request for review of a substantial development permit issued by Mason County to The Hama Hama Company, came before the Shorelines Hearings Board (Chris Smith, W. A. Gissberg, Robert E. Beaty, Robert F. Hintz and Gerald D. Probst on May 24, 25, the afternoon of May 26, May 27 and 28, 1976 in Lacey, Washington. Ellen D. Peterson,

hearing examiner, presided.

Appellants Washington State Department of Ecology and Slade Gorton, Attorney General, appeared through Robert V. Jensen, Assistant Attorney General; respondent Mason County appeared through Special Deputy Prosecutor William Vetter; respondent The Hama Hama Company appeared pro se, and Hood Canal Environmental Council, amicus curiae, through its attorney, Philip M. Best.

Having heard the testimony, having considered the transcript or portions thereof, having examined the exhibits, and having considered the arguments and briefs, the Shorelines Hearings Board makes these:

FINDINGS OF FACT

I

Hood Canal is a glacially carved fjord some 60 miles long which possesses 242 miles of shoreline, the majority of which is privately owned. Because of its attractiveness and relatively close proximity to Seattle and Tacoma, the Canal is extremely popular as a recreation destination and as a site for second homes. The waters of Hood Canal are classified as AA, and the maintenance of that excellent water quality designation is a problem because of the slow flushing time for the inlet--a minimum of nearly six months is required for a changeover of Hood Canal as a whole, which is not conducive to the assimilation of waste pollutants. The entire area along the Canal at the base of the Olympic Mountains is forest land of rough terrain and supports sizeable populations of animal species indigenous to western Washington. Bear, deer, elk and beaver are plentiful. The six major rivers which empty into the Canal abound in steelhead, trout and spawning salmon. The waters of the Canal support a wide variety of fish and shellfish.

II

The Hama Hama Company, (hereinafter "Company") being desirous of mining high quality sand and gravel from its property found that it would be necessary (for economic reasons) to utilize the waters of Hood Canal and Puget Sound for barge transport. Accordingly, the Company in July, 1973, filed its application with Mason County (hereinafter "County") for a substantial development permit "to construct a pier and barge loading facility to load sand and gravel on barges" (Exhibit A-(1)(c)). Accompanying the application was an environmental impact statement (EIS) prepared by the president of the Company without the benefit of any supervision or direction on the part of the County. That statement was reviewed by the County's only planner who satisfied himself of its compliance with the State Environmental Policy Act (SEPA Guidelines of the Department of Ecology (DOE),[1] and circulated it as a draft EIS to other governmental agencies for review and comment.

DOE received the draft EIS on August 13, 1973, the date set for hearing on the shoreline permit application. However, the hearing date was continued to September 24th, to allow other agencies sufficient time to make their comments on the draft EIS. As a result of a specific request from DOE, the County again continued the hearing on the permit and the time for receiving draft EIS comments to October 15, 1973, at which time the permit was granted. Notwithstanding such, DOE did not

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1. The Guidelines prepared by DOE were not binding upon other agencies. However, since that time the Council on Environmental Policy pursuant to legislative direction has promulgated Guidelines interpreting and implementing SEPA.

communicate its written comments to Mason County until October 24, 1973. The comments of others which were timely received by the County were physically attached to the draft EIS, together with a terse summary thereof, utilized by the County as its final EIS, and considered in its favorable action on the permit. The County Commissioners were advised of, and they took into account, DOE's orally expressed concern over potential noise and aesthetics.

III

The Company owns about 3,800 acres of land on the west side of Hood Canal and immediately south of the Hamma Hamma River and east of John's Creek, a tributary to the river, within which is about a 300-acre logged off hill, some 300 to 350 feet in elevation, from which the mining of sand and gravel would occur. It is estimated that the hill contains one hundred million tons of materials and that the mining would occur for 20 to 100 years depending upon market conditions. A small portion of the northerly face of the hill has been utilized intermittently since 1931 as a source of gravel to supply local needs, including the State Department of Highways.

IV

Except for a small portion bordering State Highway 101 which would be mined in the later years of its use, the hill is outside of the 200 foot shoreline area and the reclamation and operational mining plan is such that the excavation would be visible only for a short distance to motorists travelling south on State Highway 101.

V

A vital part of the Company's planned mining operation is the

construction of a pier and conveyor system which will project approximately 200 feet perpendicularly to the shoreline out into the waters of Hood Canal. At right angles to the end of the pier (and roughly parallel to the shore) is a planned 360 foot long loading pier. The deck below the conveyor will be approximately eight feet above mean higher high water and the uppermost portion of the conveyor system will rise about 50 feet above that water mark.

On the hill, the gravel would be loaded onto the conveyor system which would follow a natural gulley down the hill and then by a tunnel under the highway, and thence to the end of the pier and conveyor belt into a waiting barge. The pier and barge loading facilities will be visible from the highway and from the waters of Hood Canal. It will apparently be a permanent installation which will remain in place even after all of the sand and gravel have been mined from the hill. Its ultimate use is not now known nor planned.

VI

As the president of the Company testified, there is now a "fairly natural" beach at the site. Except for the intrusion of the highway and the recent logging of the hill, the shoreline of the site has retained its natural characteristics notwithstanding the fact that at one time in the past, the Hamma Hamma estuary was filled with pilings and log storage. At any event, the specific area of the site proposed for construction of the pier and barge facilities is a natural shoreline.

VII

Although a DOE witness expressed concern that if there was pollut from the project it could spill onto the estuary, the appellant failed to

prove that the project would pollute the waters of the state, except for accidental spills of sand and gravel which will occur at the barge loadin site. However, there is no biota which is unique to the site of the proposed pier. A biologist witness for appellant admitted that the effect of the project on the river delta would be minimal unless the pier were ultimately to be utilized as a marina.

VIII

The site of the pier construction is within an area which produces well for salmon sports fishermen and the pier would interfere with some deep troll and cutthroat fishermen who elect to fish in shallower waters than others. In short, the public's right of navigation will be impaired.

IX

The Department of Natural Resources (DNR) granted the Company a surface mining permit and approved its reclamation plan on August 1, 1973. The existing one to six inch soil cover of the hill is sparse and the present land use capability of the soil for crops is very limited. The U. S. Soil Conservation Service strongly supports the reclamation plan because upon its completion the mixture of reserved fines, clay and soil will have created about one to two feet of top soil whose crop capability will have been increased so as to sustain the growing of Christmas trees.

X

The increasing population pressures of urban King County are moving the location of sand and gravel pits therein further away from their place of use and thereby causing greater truck haul costs and thus

making it likely that a longer, but cheaper, water haul of sand and gravel will become more corpetitive.

It would cost five million in 1971 dollars and ten million in present dollars to develop the site as a productive pit. The Company has not made a market survey to determine the demand for gravel, but is nonetheless confident that if it can obtain all of the various governmental permits required, some enterprise would be interested in purchasing the right to remove gravel from the site. Such "interest" is confirmed by Ideal Basic Industries, the largest producer of cement in the State of Washington and the United States, which desires to enter into the concrete business. Controlling its own supply of sand and gravel is a condition to doing so. Although Ideal has made a feasibility study, (the results of which were not divulged) no decision has been made by it to purchase or lease the site. The outcome of these permit proceedings is one of the factors which it will take into account. Except for the potential of marketing the gravel to Ideal, there does not appear to be a sufficiently viable demand for sand and gravel in the quantities required of the project to enable the Company to economically succeed in its proposed venture. Nonetheless, there is always a demand for long-term sources of sand and gravel.

Recent environmental regulations have made it more difficult to obtain permits for sand and gravel operations and therefore it is likely that demand for approved sites will increase. The size and scale of the mining operation proposed (but not its appearance) would be comparable with the largest presently operating pits in the state, at Steilacoom. Those nearby two pits have an estimated remaining life of

15 and 40 years respectively.

XI

The only other economically viable use of the gravel hill would be for residential purposes and to be successful such a development would require that access be provided to the waters of Hood Canal.

XII

The greatest amount of noise which would emanate from the entire operation would be from the gravel crusher from which at a distance of 50 feet there would be decibel readings of about 95 on the "A" scale. Noise reduces 2 decibels for every hundred feet. Because of the noise-buffering nature of the trees and the distance from the proposed operations, the inhabitants of the nearest (1/4 quarter mile) residences would be unaffected by the noise. However, noise from the operation of the conveyor belt and the barge puller on the pier over the waters of Hood Canal would obviously introduce a pollutant not now present in that environment.

XIII

The mining and processing of sand and gravel will create fugitive dust and air pollution where none now exist. While the frequency of such irritants may be mitigated during periods of rainfall and the record does not reveal the intensity of that pollutant, the sheer magnitude of the proposed venture guarantees that it will be considerable and that such can be detrimental to public health.

XIV

At the time of the issuance of the permit the County had not developed any ascertainable master program.

XV

Any Conclusion of Law hereinafter stated which may be deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Shorelines Hearings Board comes to these

CONCLUSIONS OF LAW

I

Intensive land uses or developments within the shoreline of Hood Canal, a shoreline of state-wide significance, should be discouraged or prohibited. It is difficult to perceive a use more intensive and incompatible with the present shoreline and aesthetics of Hood Canal than the construction proposed by the Company. The pier, conveyor and barge loading facilities will intrude upon the magnificent grandeur that is now existent, converting the natural characteristics and beauty of the existing shoreline into one marred by this proposed industrial enterprise. Only when there is a clearly defined and present necessity for tolerating an abuse of nature's scene should an intrusion of the type here suggested be allowed in Hood Canal. Under what circumstances such a necessity might be found to exist, we need not now determine. Suffice it to say that it is not now present.

II

The foregoing delineation of our view finds statutory support in the policy section of the Shoreline Management Act of 1971[2] wherein the Department of Ecology, in adopting Guidelines for shorelines of

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2. RCW 90.58.020.

state-wide significance, is directed to prefer uses which:

(1) Recognize and protect the state-wide interest over local interest;
(2) Preserve the natural character of the shoreline;
(3) Result in long term over short term benefit;
(4) Protect the resources and ecology of the shoreline;
(5) Increase public access to publicly owned areas of the shorelines;
(6) Increase recreational opportunities for the public in the shoreline;

Testing the proposed use and development against the foregoing statutory proviso, we conclude that the permit does not at this time fall within any of the foregoing statutorily preferred uses.

III

The policy section of the Shoreline Act also mandates the preservation of the "public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state . . . ." The landward portion of the shoreline of the site is not natural, but rather is transversed by a public highway. The water portion of the shoreline, however, is now in its natural state and must be preserved for preferred uses "which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline."[3]

The substantial development is not consistent with the control of dust, noise and visual pollution, nor is its use unique to or dependent upon use of the state's shoreline.

IV

In DOE v. Hayes, SHB 108, there was enunciated what we then and

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3. RCW 90.58.020.

now consider to be the meaning of a water-dependent use:

> ". . . [A] water-dependent commerce or industry, to which priority should be given, is one which cannot exist in any other location and is dependent on the water by reason of the intrinsic nature of its operations. A water-related industry or commerce is one which is not intrinsically dependent on a waterfront location but whose operation cannot occur economically without a shoreline location."

Applying the above definition to the uses proposed by the Company leads to the conclusion that they are not water-dependent. At the most, they are arguably water-related.

The Legislature directed the Department of Ecology and local governments to give an ordered preference of uses within shorelines of state-wide significance. The Department complied by adopting its Guidelines which give preference to uses which favor public and long range goals[4] and preserve the natural character of the shoreline.[5]

The Legislature also directed that:

> "In the implementation of this policy[6] the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible . . . ." RCW 90.58.020.

Thus, the public's opportunity to enjoy the aesthetic qualities of certain shorelines and their preservation is given special treatment and emphasis.

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4. WAC 173-16-040(5).

5. WAC 173-16-040(5)(b).

6. The policy of the Shoreline Act is implemented by the proper issuance or denial of development permits.

The State Environmental Policy Act[7] (SEPA), the policies of which are by its terms supplementary[8] to the Shoreline Management Act of 1971,[9] declares that one of its ultimate aims is to the end that the state may:

> "Assure for all people of Washington . . . . esthetically and culturally pleasing surroundings;"[10]

This Board has previously recognized aesthetics as providing grounds for vacating a permit for a road and boat launching ramp at a natural shoreline fronting Hood Canal.[11]

The courts of other jurisdictions have also done so.[12] We agree that:

> "The reluctance to uphold zoning regulations . . . designed to preserve and improve the visual character of the physical environment on aesthetic grounds alone may be based on the belief that aesthetic evaluations are a matter of individual taste and are thus too subjective to be applied in any but an arbitrary and capricious manner. (citing authority) Accordingly, courts have engaged in a reasoning process, often amounting to nothing more than legal fiction, in order to avoid recognizing aesthetics as an appropriate basis for the

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7. RCW 43.21C.010.

8. RCW 43.21C.060.

9. The Shoreline Management Act became effective on May 21, 1971; SEPA on August 9, 1971.

10. RCW 43.21C.020(2)(b).

11. McCann, et al. v. Jefferson County, SHB No. 144 et seq.

12. Matter of McCormick v. Lawrence (New York), 8 ERC 1461, upholding the prohibition, for aesthetic reasons, of boat-houses on a lake relatively undeveloped and in a relatively pristine state; Donnelly v. Outdoor Advertising Board (Mass.), 8 ERC 1671. Aesthetics alone justifies total ban of bill-boards.

exercise of the police power . . . .

"We feel that this approach . . . is no longer consistent with what we perceive as the modern trend in the law."[13]

V

The proposed development, being in a shoreline of state-wide significance, is not consistent with WAC 173-16-040(5) which requires that preference must be given to uses which favor public and long-range goals. No such preferential treatment is afforded to the public by the proposed development. While the removal and use of gravel from the hill may ultimately increase the productivity of the land and hence can be said to favor long-range goals and further the state-wide interest, such cannot be said of the pier construction. It is the pier and conveyor system portion of the proposal within the shoreline which we find to be inconsistent with the Act and the DOE Guidelines.

VI

The permit issued by Mason County is inconsistent with the policy of the Shoreline Management Act of 1971 and the Guidelines adopted by the Department of Ecology pursuant thereto. The permit must therefore be vacated.

VII

DOE contends that the environmental impact statement is inadequate because it fails to discuss or quantify many potential adverse environmental impacts of the proposal.

The EIS is clearly not a model for thoroughness in that the

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13. Donnelly v. Outdoor Advertising, supra.

environmental effects of the proposed action are not sufficiently disclosed, discussed and substantiated by supportive opinion and data.[14] However, to the extent practicable at the time it was written, considering the lack of resources then available to Mason County, and the state of the art, including that of the Department of Ecology, the statement was remarkably well done when judged by the then-prevailing standards.

Even though the statement may be inadequate when judged by today's standards, the Department of Ecology must share the blame and consequences therefore. It did not respond to the draft statement within the time nor in the manner contemplated by SEPA.

For SEPA to fulfill the high hopes expressed in its legislative enactment and by its own terms, various units of government must sincerely share their expertise with one another in a manner and detail calculated to assist in developing the environmental disclosures contemplated by the Act. Regardless of its reasons, DOE failed to comment on the draft EIS in a manner helpful to Mason County or the EIS process. Indeed, only after the permit was issued and after ample opportunity had been extended to it did DOE belatedly respond, and then not in the detail which its superior expertise should dictate.

The Council on Environmental Policy has issued official guidelines, now published as a part of the Washington Administrative Code, which speak to this issue and more. While the guidelines took effect after Mason County took the action which is the subject of this review, and we do not apply them retroactively, we may and do utilize them as

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14. Leschi v. Highway Comm., 84 Wn.2d 271 at 286 (1974).

suggested interpretation of the statute.[15]

The guidelines, in pertinent part provide:

> WAC 197-10-405 . . . (2) Another principal function to be served by the draft EIS process is to facilitate the transmittal to the lead agency from other governmental agencies and interested citizens substantive information concerning the adverse impacts upon the environment discussed inadequately or erroneously in the draft EIS. The draft EIS process also provides an opportunity for reviewers of the document to bring to the attention of the lead agency any issue of potential environmental concern which should be explored by the lead agency prior to the issuance of a final EIS.
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> WAC 197-10-510 . . . Each state agency with jurisdiction, when . . . reviewing a draft EIS, shall immediately begin the research and, if necessary, field investigations which it would normally conduct in conjunction with whatever license it requires for a proposal; or, in the event no license is involved the agency with jurisdiction shall investigate the impacts of the activity it will undertake which gives it jurisdiction over a portion of the proposal. The end result of these investigations should be that each agency with jurisdiction will be able to transmit to the lead agency substantive information on those environmental impacts of the proposal which are within the scope of the license or activity of the agency with jurisdiction. An agency with jurisdiction, in its response to the lead agency, should also indicate which of the impacts it has discovered may be mitigated or avoided and how this might be accomplished, and describe those areas of environmental risks which remain after it has conducted the investigations that may have been required.
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> WAC 197-10-520 RESPONSIBILITIES OF CONSULTED AGENCIES--STATE AGENCIES WITH ENVIRONMENTAL EXPERTISE. (1) Each state agency participating in pre-draft consultation, or reviewing a draft EIS, lacking jurisdiction, but possessing environmental expertise pertaining to the impacts associated with a proposal [see WAC 197-10-465], when requested by the lead agency, shall provide to the lead agency that substantive data, information, test results or other material relevant to the proposal which the consulted agency then possesses relating to its area of special expertise.
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> . . . .

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15. No Oil v. Los Angeles, 7 ERC 1257.

> WAC 197-10-545 EFFECT OF NO WRITTEN COMMENT. If a consulted agency does not respond with written comments within thirty-five days of the date of listing of the draft EIS in the "EIS available Register," or fails to respond within the fifteen-day extension period which may have been granted by the lead agency, the lead agency may assume that the consulted agency has no information relating to the potential impact of the proposal upon the subject area of the consulted agency's jurisdiction or special expertise. Any consulted agency which fails to submit substantive information to the lead agency in response to a draft EIS is thereafter barred from alleging any defects in the lead agency's compliance with WAC 197-10-400 through -495, or with the contents of the final EIS.

In short, a governmental agency with expertise which, having ample opportunity to do so, does not timely point out deficiencies of a draft EIS forecloses its right to thereafter attack the adequacy of the final statement dealing with that deficiency.[16]

VIII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

Therefore, the Shorelines Hearings Board issues this

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16. Natural Resources Defense Council v. TVA, ERC 1669 at 1672.

ORDER

The substantial development permit be and the same is vacated.

DONE this 2nd day of July, 1976.

SHORELINES HEARINGS BOARD

Chris Smith
CHRIS SMITH, Chairman

ROBERT E. BEATY, Member

W. A. Gissberg
W. A. GISSBERG, Member

Robert F. Hintz
ROBERT F. HINTZ, Member

Gerald D. Probst
GERALD D. PROBST, Member